INDEX

PAGE

Opinions Below 2

Jurisdiction 2

Questions Presented for Review 3

Statutes Involved 4

Statement of the Case 5

Reasons for Denying the Writ:

I. The Illinois Appellate Court Correctly Found That The Confrontation Issue Had Been Waived And The Substantive Issue Cannot Properly Be Decided By This Court 8

II. Even If The Confrontation Issue Were Properly Raised, No Violation Of The Right To Confront Witnesses Could Be Shown 10

Conclusion 13

CITATIONS

CASES:

Davis v. *Alaska,* 415 U.S. 308, (1975) 8

Henry v. *Mississippi,* 379 U.S. 443 (1965) 8

People v. *McClellan,* 29 Ill. App. 3d 712, 331 N.E. 2d 292 (1st Dist. 1975) 8

STATUTES:

Ill. Rev. Stat. Ch. 38 §14-2, 14-4 (1973) 9

Ill. Rev. Stat. Ch. 38 §14-5 (1973) 9

BLEED THROUGH

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-875

CHARLES McCLELLAN,

Petitioner,

VS.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(On Petition For Writ Of Certiorari To The Appellate Court of Illinois, First District)

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinions below are adequately set forth in the Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED FOR REVIEW

1. Whether the Illinois Appellate Court correctly found that the Confrontation Issue had been waived and whether the substantive issue can properly be decided by this Court.

2. If the confrontation issue was properly raised, whether a violation of the right to confront witnesses could be shown.

STATUTES INVOLVED

The statutes involved are adequately set forth in the Petition.

STATEMENT OF THE CASE

On September 16, 1972, Freddie McClellan, her twelve year old daughter, Starlon, and her sister, Della Leslie, were driving in Della Leslie's automobile in Chicago when they saw Freddie McClellan's estranged husband, Charles McClellan, in his car approaching from the opposite direction. (R. 93-95) Shortly thereafter, while their car was stopped at a stoplight, the petitioner, Charles McClellan, pulled up behind them, got out of his car and approached the front window of their car on the driver's side. (R. 96) He told them to pull over because he wanted to talk to Freddie McClellan. Della Leslie pulled away from the stoplight and the petitioner went back to his car. (R. 97) At another intersection, the petitioner came to a stop along the passenger side of Della Leslie's automobile, got out of his car, and approached Freddie McClellan who was seated on the passenger side. (R. 97) He said he wanted to talk to her and she replied that they had nothing to talk about. (R. 98) He pulled a gun from his jacket, shot Freddie twice, shot Starlon once and fired shots in the direction of Della Leslie as she was getting out of the car. (R. 98-99)

Petitioner was indicted for the murder of Starlon McClellan, for aggravated battery upon Freddie McClellan, and aggravated assault upon Della Leslie. The aggravated assault charge was dismissed before trial, the petitioner was found not guilty of murder and guilty of aggravated battery.

The petitioner testified at trial, stating that it was Freddie McClellan who pulled a gun on him, they struggled for it and the shots went off. (R. 354-355)

On the cross-examination of Freddie McClellan, defense counsel asked her if, during phone calls with the petitioner in the weeks prior to the incident, she had used abusive and threatening language with him. She replied in the negative. (R. 55) At this point defense counsel mentioned alleged tapes of those conversations but an objection by the prosecutor brought a ruling that the tapes could not *presently* be referred to because they had not yet been given to the State in the course of discovery. (R. 55-56) The following morning, in court and outside the presence of the jury, defense counsel tendered the tapes to the State and the Court warned defense counsel as follows:

> THE COURT: Before you do anything, Counsel, it is my duty to warn you about the statute, isn't it?
>
> MR. GOLDSTEIN: Well, this is not the statute that we are discussing.
>
> THE COURT: Let's get the statute. You may be in violation of the law even by turning them over to anyone.
>
> MR. GOLDSTEIN: Well, I have done it with the consent of my client.
>
> THE COURT: But you don't have the consent of the party—
>
> MR. SCHAFFNER: Would you want Chapter 38?
>
> THE COURT: Yes.
>
> I hate to see you arrested as a result of you turning this over to the Court.
>
> MR. GOLDSTEIN: Then I will learn more.
>
> I am turning them over with the consent of the defendant in this cause, who wants to use these tapes for impeachment.
>
> (Whereupon after an interval of time the following proceedings were had, to-wit:)

BLEED THROUGH

MR. GOLDSTEIN: All right. On behalf of my client, in lieu of what Your Honor said, he is withdrawing the tapes and not using them.

THE COURT: Not using them?

MR. GOLDSTEIN: Right.

THE COURT: All right. (R. 155-157)

Defense counsel made no motion for an *in camera* hearing of the tapes, but promptly withdrew them. Later, while petitioner was on the witness stand describing the events leading up to the incident, no question was asked him concerning the existence or substance of the telephone calls between petitioner and Freddie McClellan that were allegedly the subject of the tapes.

At the hearing on the motion for a new trial, the petitioner did not raise the issue of exclusion of the tapes as a ground for a new trial. (R. 478-480) The Appellate Court of Illinois, First District, found that petitioner had not properly raised the issue of whether the tapes should be admitted and it was therefore waived.

REASONS FOR DENYING THE WRIT

I.

THE ILLINOIS APPELLATE COURT CORRECTLY FOUND THAT THE CONFRONTATION ISSUE HAD BEEN WAIVED AND THE SUBSTANTIVE ISSUE CANNOT PROPERLY BE DECIDED BY THIS COURT.

The Appellate Court refused to decide the issue of whether the trial court had prevented him from using favorable evidence because the tapes were never offered into evidence. *People* v. *McClellan,* 29 Ill. App. 3d 712, 331 N.E. 2d 292 (1975). On the basis of the instant record, it would have been improper to decide the constitutional issue of whether the anti-eavesdropping statute was in conflict with the Sixth Amendment.

It is well established that the right of confrontation of witnesses does not include the right of unlimited cross examination of the State's witnesses, and broad discretion lies with the trial judge to preclude some areas of cross-examination. *Davis* v. *Alaska,* 415 U.S. 308, 316 (1975). Since counsel withdrew his offer of the tapes to the State's Attorney, the trial judge had no opportunity to rule on the propriety of their use as impeachment material. These circumstances present precisely the situation which this Court had held to preclude review of a state court judgment; the state procedural rule requiring that the matter be explored at the trial level serves the valid state interest of a contemporaneous hearing. *Henry* v. *Mississippi,* 379 U.S. 443, 446-448 (1965). In this case, an *in camera* hearing of the tapes would have been a viable measure to fairly

BLEED THROUGH

explore the question of whether the defendant needed the tapes for an adequate cross-examination of the witness.

Further, it is clear that such withdrawal of the tapes was voluntary. Defense counsel was not threatened with arrest or prosecution. The judge merely directed his attention to the provision of the Criminal Code making eavesdropping a misdemeanor. (Ill. Rev. Stat., Ch. 38, § 14-2, 14-4). Neither the judge nor the prosecutor made any indication of the consequences of his turning over the tapes. Also the judge gave no clue as to whether he would rule that the tapes were inadmissible in accordance with the Illinois statute (§ 14-5) or find the statute unconstitutional had that issue been properly raised before him. (R. 155-156)

The Appellate Court correctly found that petitioner actually waived the issue since he failed to include it in his motion for a new trial and he did not request an *in camera* inspection of the tapes.

Further, defense counsel missed another opportunity to rebut the testimony given by Freddie McClellan. In the extensive examination of Charles McClellan relative to the events of the weeks leading up to the incident, counsel never questioned him about the telephone conversations between him and his wife which were allegedly the subject of the tapes. The voluntary withdrawal of the tapes constitutes a waiver of the constitutional issues raised by the petitioner and such issues should not be considered by this Court.

II.

EVEN IF THE CONFRONTATION ISSUE WERE PROPERLY RAISED, NO VIOLATION OF THE RIGHT TO CONFRONT WITNESSES COULD BE SHOWN.

Even if the issue were not waived, the tapes were properly excludable. Very recently this Court considered a limitation of defense cross-examination by the state trial judge and while recognizing the trial judge's broad discretion stated that whether the defendant's right under the Confrontation Clause was infringed depended upon the adequacy of the scope of cross-examination permitted. *Devis* v. *Alaska, supra* at p. 316-317.

If petitioner's attempt to use the tapes for impeachment could be construed as sufficient to assert his claim, the bar to their use did not constitute a violation of his right to confront witnesses under the Sixth Amendment because he did have an opportunity to adequately cross-examine the witness.* Without speculating on the specific content of the tapes, their general description is sufficient to show that they would not have materially aided the petitioner's defense. From counsel's foundation for impeachment it is apparent that the tapes allegedly contain foul language and threats by the witness who was talking to her estranged husband on the telephone. (R. 55) Freddie McClellan had testified

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*Petitioner's reliance on the Fifth Amendment is inapposite. The cases cited in support thereof, *Brady* v. *Maryland*, 373 U.S. 83 (1963) and others, relate to unilateral suppression by the prosecutor of exculpatory information. No analogy to the instant case can reasonably be drawn from the cases cited.

BLEED THROUGH

concerning the nature of her relationship with the petitioner prior to the incident. She pretended no beneficent feelings for the petitioner; on the contrary, she testified on cross-examination that the petitioner beat her and she had left him. (R. 45, 55)

On the other hand, when Charles McClellan took the witness stand, the only mention of these problems between Charles and Freddie McClellan were contained in unresponsive answers by petitioner to questions posed by his counsel.

> Q. What was happening to your marriage?
>
> A. It was getting kind of rough, you might say, because somebody was feeding her information about—
>
> MR. SCHAFFNER: Object. (R. 343)
>
> * * *
>
> Q. Okay. Then what if anything did you do?
>
> A. My little girl waved at me and I waved back at her, and then I proceeded down Division but I had in my mind then what was taking place, you know, after I had some phone calls, very bad phone calls—
>
> MR. SCHAFFNER: Object (R. 352)

Defense counsel never questioned him about the allegedly abusive phone calls.

If the substance of the phone calls between petitioner and Freddie McClellan were so crucial to Freddie McClellan's cross-examination, it is hard to imagine why defense counsel totally ignored an opportunity to directly question the petitioner on that subject when he took the witness stand to tell his side of the facts.

Further, the testimony sought to be impeached was not relating the facts of the actual shooting, but was merely the circumstantial statement that she did not use foul lan-

guage on the telephone with the defendant in the weeks prior to the incident. The ill feelings between the petitioner and Freddie McClellan were already before the jury. The type of impeachment sought would reveal no hidden bias as was the case in *Davis* v. *Alaska, supra.*

Balanced against this lack of harmful effect to the petitioner is the state's interest in protecting the privacy of all its citizens. Here, the petitioner flagrantly violated the law and now attempts to use the fruits of that illegal conduct in court. The Illinois statute prohibiting eavesdropping and the use of such illegally obtained evidence in court is essential to preserve the individual dignity of the citizens of Illinois. So important is this goal that the Illinois Constitution specifically mentions eavesdropping in Article One, section six. The interest sought to be protected here is far more important than the one found to be insufficient in *Davis* v. *Alaska, supra,* the protection of a juvenile's criminal record. This Court's opinion in *Davis* clearly sets forth a balancing test to be applied when applying the Confrontation Clause to a situation involving another valid state interest. Here, the slight encroachment upon a claim to unbridled confrontation of a witness, if indeed there is an encroachment, is minimal and the compelling state interest in protecting the privacy of its citizens is paramount.

CONCLUSION

For the foregoing reasons, respondents respectfully request this Court to deny the petition for writ of certiorari.

Respectfully submitted,

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